

AMENDED IN ASSEMBLY JULY 9, 2015

AMENDED IN SENATE MAY 12, 2015

AMENDED IN SENATE MAY 5, 2015

AMENDED IN SENATE APRIL 6, 2015

## SENATE BILL

**No. 358**

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**Introduced by Senator Jackson**

**(Coauthors: Senators *Glazer*, *Hall*, *Hancock*, *Hernandez*, *Leno*,  
*Mitchell*, and *Pavley*)**

(Coauthors: Assembly Members *Chávez*, *Chu*, *Dodd*, *Cristina Garcia*,  
*Eduardo Garcia*, *Gonzalez*, *Roger Hernández*, *Rodriguez*, and *Weber*)

February 24, 2015

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An act to amend Section 1197.5 of the Labor Code, relating to private employment.

### LEGISLATIVE COUNSEL'S DIGEST

SB 358, as amended, Jackson. Conditions of employment: gender wage differential.

Existing law regulates the payment of compensation to employees by employers and prohibits an employer from conditioning employment on requiring an employee to refrain from disclosing the amount of his or her wages, signing a waiver of the right to disclose the amount of those wages, or discriminating against an employee for making such a disclosure.

Existing law generally prohibits an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Existing law establishes

exceptions to that prohibition where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex. Existing law makes it a misdemeanor for an employer or other person acting either individually or as an officer, agent, or employee of another person to pay or cause to be paid to any employee a wage less than the rate paid to an employee of the opposite sex as required by these provisions, or who reduces the wages of any employee in order to comply with these provisions.

This bill would revise that prohibition to eliminate the requirement that the wage differential be within the same establishment, and instead would prohibit an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, as specified. The bill would revise and recast the exceptions to require the employer to affirmatively demonstrate that a wage differential is based upon one or more specified factors, including a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor ~~that is not based on or derived from a sex-based differential in compensation and is consistent with a business necessity, as defined.~~ *other than sex, as specified.* The bill would also require the employer to demonstrate that each factor relied upon is applied reasonably, and that the one or more factors relied upon account for the entire differential. The bill would prohibit an employer from discharging, or in any manner discriminating or retaliating against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of these provisions. The bill would authorize an employee who has been discharged or discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in these provisions, to recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief. The bill would prohibit an employer from prohibiting an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under these provisions. The bill would also increase the duration of employer recordkeeping requirements from 2

years to 3 years. By changing the definition of a crime, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: yes.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. The Legislature finds and declares the following:
- 2 (a) In 2014, the gender wage gap in California stood at 16 cents
- 3 on the dollar. A woman working full time year round earned an
- 4 average of 84 cents to every dollar a man earned. This wage gap
- 5 extends across almost all occupations reporting in California. This
- 6 gap is far worse for women of color; Latina women in California
- 7 make only 44 cents for every dollar a white male makes, the biggest
- 8 gap for Latina women in the nation.
- 9 (b) While the state's overall wage gap is slightly lower than the
- 10 national average of 78 cents to the dollar, the persistent disparity
- 11 in earnings still has a significant impact on the economic security
- 12 and welfare of millions of working women and their families.
- 13 Collectively, women working full time in California lose
- 14 approximately \$33,650,294,544 each year due to the gender wage
- 15 gap. The wage gap contributes to the higher statewide poverty rate
- 16 among women, which stands at 18 percent, compared to
- 17 approximately 15 percent for men, and the poverty rate is even
- 18 higher for women of color and single women living with children.
- 19 (c) California has prohibited gender-based wage discrimination
- 20 since 1949. Section 1197.5 of the Labor Code was enacted to
- 21 redress the segregation of women into historically undervalued
- 22 occupations, but it has evolved over the last four decades so that
- 23 it is now virtually identical to the federal Equal Pay Act of 1963
- 24 (29 U.S.C. Sec. 206(d)). However, the state provisions are rarely
- 25 utilized because the current statutory language makes it difficult
- 26 to establish a successful claim.
- 27 (d) Pay secrecy also contributes to the gender wage gap, because
- 28 women cannot challenge wage discrimination that they do not

1 know exists. Although California law prohibits employers from  
2 banning wage disclosures and retaliating against employees for  
3 engaging in this activity, in practice many employees are unaware  
4 of these protections and others are afraid to exercise these rights  
5 due to potential retaliation.

6 (e) To eliminate the gender wage gap in California, the state's  
7 equal pay provisions and laws regarding wage disclosures must  
8 be improved.

9 SEC. 2. Section 1197.5 of the Labor Code is amended to read:

10 1197.5. (a) An employer shall not pay any of its employees  
11 at wage rates less than the rates paid to employees of the opposite  
12 sex for substantially similar work, when viewed as a composite of  
13 skill, effort, and responsibility, and performed under similar  
14 working conditions, except where the employer demonstrates:

15 (1) The wage differential is based upon one or more of the  
16 following factors:

17 (A) A seniority system.

18 (B) A merit system.

19 (C) A system that measures earnings by quantity or quality of  
20 production.

21 (D) A bona fide factor *other than sex, such as education,*  
22 *training, or experience. This factor shall apply only if the employer*  
23 *demonstrates that the factor is not based on or derived from a*  
24 *sex-based differential in—compensation and compensation, is job*  
25 *related with respect to the position in question, and is consistent*  
26 *with a business—necessity, such as a difference in education,*  
27 *training, or experience that is job related with respect to the position*  
28 *in question. necessity.* For purposes of this subparagraph, "business  
29 necessity" means an overriding legitimate business purpose such  
30 that the factor relied upon effectively fulfills the business purpose  
31 it is supposed to serve. This defense shall not apply if the employee  
32 demonstrates that an alternative—~~employment~~ *business* practice  
33 exists that would serve the same business purpose without  
34 producing the wage differential.

35 (2) Each factor relied upon is applied reasonably.

36 (3) The one or more factors relied upon account for the entire  
37 wage differential.

38 (b) Any employer who violates subdivision (a) is liable to the  
39 employee affected in the amount of the wages, and interest thereon,

1 of which the employee is deprived by reason of the violation, and  
2 an additional equal amount as liquidated damages.

3 (c) The Division of Labor Standards Enforcement shall  
4 administer and enforce this section. If the division finds that an  
5 employer has violated this section, it may supervise the payment  
6 of wages and interest found to be due and unpaid to employees  
7 under subdivision (a). Acceptance of payment in full made by an  
8 employer and approved by the division shall constitute a waiver  
9 on the part of the employee of the employee's cause of action  
10 under subdivision (g).

11 (d) Every employer shall maintain records of the wages and  
12 wage rates, job classifications, and other terms and conditions of  
13 employment of the persons employed by the employer. All of the  
14 records shall be kept on file for a period of three years.

15 (e) Any employee may file a complaint with the division that  
16 the wages paid are less than the wages to which the employee is  
17 entitled under subdivision (a) or that the employer is in violation  
18 of subdivision (j). The complaint shall be investigated as provided  
19 in subdivision (b) of Section 98.7. The division shall keep  
20 confidential the name of any employee who submits to the division  
21 a complaint regarding an alleged violation of subdivision (a) or  
22 (j) until the division establishes the validity of the complaint, unless  
23 the division must abridge confidentiality to investigate the  
24 complaint. The name of the complaining employee shall remain  
25 confidential if the complaint is withdrawn before the confidentiality  
26 is abridged by the division. The division shall take all proceedings  
27 necessary to enforce the payment of any sums found to be due and  
28 unpaid to these employees.

29 (f) The department or division may commence and prosecute,  
30 unless otherwise requested by the employee or affected group of  
31 employees, a civil action on behalf of the employee and on behalf  
32 of a similarly affected group of employees to recover unpaid wages  
33 and liquidated damages under subdivision (a), and in addition shall  
34 be entitled to recover costs of suit. The consent of any employee  
35 to the bringing of any action shall constitute a waiver on the part  
36 of the employee of the employee's cause of action under  
37 subdivision (g) unless the action is dismissed without prejudice  
38 by the department or the division, except that the employee may  
39 intervene in the suit or may initiate independent action if the suit

1 has not been determined within 180 days from the date of the filing  
2 of the complaint.

3 (g) Any employee receiving less than the wage to which the  
4 employee is entitled under this section may recover in a civil action  
5 the balance of the wages, including interest thereon, and an equal  
6 amount as liquidated damages, together with the costs of the suit  
7 and reasonable attorney's fees, notwithstanding any agreement to  
8 work for a lesser wage.

9 (h) A civil action to recover wages under subdivision (a) may  
10 be commenced no later than two years after the cause of action  
11 occurs, except that a cause of action arising out of a willful  
12 violation may be commenced no later than three years after the  
13 cause of action occurs.

14 (i) If an employee recovers amounts due the employee under  
15 subdivision (b), and also files a complaint or brings an action under  
16 subdivision (d) of Section 206 of Title 29 of the United States  
17 Code which results in an additional recovery under federal law for  
18 the same violation, the employee shall return to the employer the  
19 amounts recovered under subdivision (b), or the amounts recovered  
20 under federal law, whichever is less.

21 (j) (1) An employer shall not discharge, or in any manner  
22 discriminate or retaliate against, any employee by reason of any  
23 action taken by the employee to invoke or assist in any manner  
24 the enforcement of this section. An employer shall not prohibit an  
25 employee from disclosing the employee's own wages, discussing  
26 the wages of others, inquiring about another employee's wages,  
27 or aiding or encouraging any other employee to exercise his or her  
28 rights under this section. Nothing in this section creates an  
29 obligation to disclose wages.

30 (2) Any employee who has been discharged, discriminated or  
31 retaliated against, in the terms and conditions of his or her  
32 employment because the employee engaged in any conduct  
33 delineated in this section may recover in a civil action reinstatement  
34 and reimbursement for lost wages and work benefits caused by  
35 the acts of the employer, including interest thereon, as well as  
36 appropriate equitable relief.

37 (3) A civil action brought under this subdivision may be  
38 commenced no later than one year after the cause of action occurs.

39 SEC. 3. No reimbursement is required by this act pursuant to  
40 Section 6 of Article XIII B of the California Constitution because

1 the only costs that may be incurred by a local agency or school  
2 district will be incurred because this act creates a new crime or  
3 infraction, eliminates a crime or infraction, or changes the penalty  
4 for a crime or infraction, within the meaning of Section 17556 of  
5 the Government Code, or changes the definition of a crime within  
6 the meaning of Section 6 of Article XIII B of the California  
7 Constitution.

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